

NTSB Order No. EA-4874

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 28th day of December, 2000

Respondent .

Docket CP-68

Respondent appeals the written initial decision of Administrative Law Judge William A. Pope, II, rendered on June 3, 1999, after an evidentiary hearing held in Anchorage, Alaska, on April 12-13, 1999.<sup>1</sup> By that decision, the law judge affirmed the Administrator's Order of Assessment imposing a civil penalty of

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\$2,200 against respondent for alleged violations of sections 91.13(a) and 91.119(c) of the Federal Aviation Regulations ("FARs").<sup>2</sup> We grant the appeal.

The Administrator's Order of Assessment alleged:

1. You are now, and at all times mentioned herein you were, the holder of Airman Pilot Certificate No. 53268302 with commercial pilot privileges.

2. On or about August 23, 1997, you served as pilot in command of civil aircraft N35962, a Cessna Model CE-U206F, on a flight which ended with a landing on Lake Lucille in Wasilla, Alaska.

3. While approaching Lake Lucille prior to landing on the above flight, you passed over Lake Lucille Lodge and persons outside the lodge attending a wedding reception.

4. You then descended to approximately 100 feet AGL and proceeded to the middle of Lake Lucille where you executed a 90 degree left turn.

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<sup>2</sup> FAR sections 91.13 and 91.119, 14 C.F.R. Part 91, state:

**Sec. 91.13 Careless or reckless operation.**

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

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**Sec. 91.119 Minimum safe altitudes: General.**

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

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(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

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5. While maintaining an altitude of approximately 100 feet AGL you proceeded eastbound at approximately the center of the lake and then executed a steep, 180 degree turn near the trees and houses along the north shore of the lake.

6. You then proceeded along the north shore and then landed near Lake Lucille Lodge.

7. While executing the turn and proceeding over the north shore of the lake referenced in paragraphs 5 and 6, you came closer than 500 feet to several houses.

8. Coming to within 500 feet of the houses referenced in paragraph 7 was not necessary for landing because a landing on Lake Lucille could easily and safely have been accomplished without coming within 500 feet of any person, vessel, vehicle or structure.

At the hearing,<sup>3</sup> the Administrator presented the testimony of Federal Aviation Administration Inspector John O. Elgee, who witnessed respondent's landing while off-duty and standing on his dock situated on the north shore of Lake Lucille, approximately one-quarter to one-half mile east of the Lake Lucille Lodge. Respondent, and other percipient witnesses who observed the landing from the lodge, offered somewhat different accounts of the landing.<sup>4</sup> Respondent testified, essentially, that he performed a normal landing to the west, toward the lodge, in the eastern portion of the lake after aborting his first attempt due to jet skis he claimed were maneuvering erratically in the

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<sup>3</sup> The law judge's initial decision recounts the hearing testimony in considerable detail. Initial Decision ("I.D.") at 2-6.

<sup>4</sup> The law judge rejected the opinion of Inspector Elgee that respondent was showing off for the wedding guests at the lodge, concluding that "by the time he actually landed on the surface of the lake, he was so far away from the lodge that the landing was barely noticeable to the guests[.]" I.D. at 7.

vicinity.<sup>5</sup> He further testified that because after landing he was a considerable distance from his destination, the lodge, he step-taxied his aircraft along the northern shoreline toward the lodge. The law judge found that Inspector Elgee was a "credible witness as to what he could see," but did not credit Inspector Elgee's testimony that respondent landed in front of his property and found, instead, that respondent landed east of Inspector Elgee's vantage point.<sup>6</sup> I.D. at 6. The law judge credited the testimony of Inspector Elgee that respondent, after touching down, step-taxied his aircraft approximately 100 feet offshore from Inspector Elgee's dock.<sup>7</sup> I.D. at 6-7. The law judge concluded that respondent violated FAR sections 91.13(a) and

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<sup>5</sup> The law judge's decision implicitly credits this testimony, and rejects testimony that respondent flew an improper approach prior to touching down on the lake.

<sup>6</sup> The law judge concluded, apparently, that respondent touched down an appreciable distance east of Inspector Elgee's dock. I.D. at 6 (noting that witnesses watching respondent's landing from the lodge's dock "were from 1/2-to-3/4 of a mile away"); see also footnote 4, supra ("he was so far away from the lodge that the landing was barely noticeable to the guests"). This is consistent with the testimony offered by many of the witnesses, and there is no basis, contrary to the Administrator's arguments, to suggest that the law judge erred in rejecting Inspector Elgee's claim that respondent touched down in front of his property. And, clearly, we think, the law judge based his decision, not upon any component of respondent's landing, but on the subsequent high-speed step-taxi.

<sup>7</sup> At the hearing, respondent was unable to recount how close he came to the shore when he passed by Inspector Elgee's residence, explaining that he was concentrating more on the jet skis, but he estimated on the basis of photographic exhibits that depicted his aircraft step-taxiing on the day of the alleged incident that he step-taxied approximately 300 to 500 feet from the northern shoreline. Transcript ("Tr.") at 328-329.

91.119(c) because his step-taxi within 500 feet of Inspector Elgee's dock was "not necessary for his landing" and "presented an unacceptable risk of loss of control ... possibly a catastrophic crash-landing[.]" I.D. at 8-9. Accordingly, he upheld the imposition of the Administrator's \$2,200 civil penalty. I.D. at 9.

As a threshold issue, we must address whether, as respondent claims, respondent was denied adequate notice of the charges against him and, therefore, a sufficient opportunity to defend against them. We think that he was, and that this is evident by comparing the law judge's basis for the violations with the facts alleged in the complaint. See Complaint ¶¶ 7-9 (stating that flying closer than 500 feet to several houses on the north shore of Lake Lucille was not necessary for landing and careless); see also Tr. at 13 (Administrator's counsel stating, in opening argument, "essentially the charge as it's stated in the complaint, *flying* closer than 500 feet to the houses along the north shore") (emphasis added). More precisely, the Administrator's complaint, focusing, as it does, on in-flight maneuvers preceding a landing, gave respondent insufficient notice that he was going to have to defend actions subsequent to touching down on the lake as the basis for the FAR violations.<sup>8</sup>

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<sup>8</sup> See, e.g., Tr. at 341-343; see also Tr. at 293 (Administrator's counsel, in response to law judge's query to counsel whether step-taxiing an aircraft within 500 feet of persons, vessels, or structures would be a violation of section 91.119(c), stating, "I, of course, was not anticipating this particular issue").

It was prejudicial error for the law judge to base his decision on these unalleged grounds.<sup>9</sup> Administrator v. Bell, 5 NTSB 289 (1985). Because it is clear that the law judge did not ratify the factual elements actually set forth in the Administrator's complaint, we reverse his conclusion that the Administrator proved that respondent violated FAR sections 91.13(a) and 91.119(c) as alleged, and dismiss the Administrator's complaint.<sup>10</sup>

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is granted;
2. The law judge's decision is reversed; and
3. The Administrator's Order of Assessment is dismissed.

HALL, Acting Chairman, HAMMERSCHMIDT, GOGLIA, BLACK, and CARMODY, Members of the Board, concurred in the above opinion and order.

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<sup>9</sup> We do not reach the issue of whether under the circumstances here it is a violation of FAR sections 91.13(a) and 91.119(c) to step-taxi a seaplane within 500 feet of persons, vessels, or structures. In light of our decision, such uncharged conduct is not within the four corners of this case.

<sup>10</sup> The Administrator's inference on appeal, apparent from her efforts to narrate what various witnesses could or could not have seen, that the law judge did not properly assess the evidence, is unavailing. We discern no error in the law judge's implicit credibility assessments, nor in his reconciliation and weighing of the varied testimony from percipient witnesses who observed the relevant events from different vantage points and under different circumstances.